

***United States Court of Appeals
for the Second Circuit***



APPENDIX

1
2 buyer goodwill was worth 30 or 40 per cent of sales
3 to an extent, and that it was very important to keep
4 that goodwill.

5 Q Did he also say to you, some time during
6 that day, that Topper sales were final, and they were
7 "hardnosed" about taking returns?

8 A He definitely said sales were final, and his
9 very words were, "hardnosed."

10 Q If you can recollect, Mr. Thompson, the one
11 about sales being final, and Topper being hardnosed, or
12 the one about danger of overstocking, which came first,
13 chronologically, that day?

14 A I believe the comment about overstocking
15 customers that I have just referred to was in Mr.
16 Rose's office, and that came first.

17 Then, coming back from the computer room,
18 the comments about sales being final were made outside
19 Obolsky's office.

20 Q When he made the later comments about sales
21 being final and Topper being hardnosed, did you refer
22 to or bring up in any way in that connection his pre-
23 vious statement about the danger of overstocking custo-
24 mers?

25 A At that time, no. It was just before lunch,

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1
2 and we were going back to his office, I think, because
3 Mr. MacArthur sent word up he wanted to have lunch with
4 me.

5 But we discussed that later on in the after-
6 noon, of course, as you know from reading my previous
7 testimony.

8 Q Did you ask Rose what happened if a customer,
9 for one reason or another, was overstocked more than it
10 could sell?

11 A Yes, I did.

12 He said that there was no legal right of
13 return here, and that the company was very hardnosed
14 about accepting returns.

15 He said that they discouraged this. "Dis-
16 couraged" is also his exact word.

17 He then went on to qualify this, when I
18 pressed him about it, by saying if there was a small
19 quantity of a successful line, that the company would
20 balance inventories.

21 But this was put to me in the context of
22 exchanging Dawn Beauty Pageant for Dancing Queen.

23 I was left with the strong impression that
24 they would not accept clinkers.

25 I'll add one other part that has been left



that is headed "Accounts Receivable Report" and the last column is headed "Other." Do you see that?

A Yes.

Q Do you know what "Other" represented?

A No.

Q Did you know at the time, do you recall?

A I know I didn't know.

Q Did you ask anyone?

A No.

Q Was it your understanding that these three pages that follow, a page headed "Accounts Receivable Report" are sample pages from an accounts receivable trial balance?

A These were samples of the kinds of controls that the company had. I can't say whether they were actually, you know, ones that were in the book or whether this was something that Mr. Rose put together specifically to talk to us about on our questions on his controls.

Q Did you ever ask to see a report such as this with regard to all Topper's customers?

A No.

Q Did you ever ask for totals from a report such as this for all Topper's customers?

A No.

Q Mr. Thompson, I show you what has been marked as

* * * Thompson * * *

1
2 "them"; that testimony refers to the conversation with
3 Mr. Waldman we have been referring to, does it not?

4 A No.

5 Q I am sorry. Would you read that over, and
6 see if perhaps it does not.

7 (Discussion off the record.)

8 Q You testify on page 34 of your previous
9 transcript, "There was some comment to the effect that
10 we were getting a return on our money that we were pay-
11 ing them."

12 Who made that comment?

13 A This occurred in the conversation between
14 Mr. Mole and I.

15 Q You never made that comment to Mr. Waldman?

16 A I never made the comment to Mr. Waldman.

17 Q Did you mention to Mr. Waldman your invest-
18 ment advisory relationship with First National City
19 Bank?

20 A No.

21 Q Besides other people connected with the Pen-
22 sion Fund and Jay Byrnes, did you tell anybody else
23 about your telephone call to Mr. Waldman, your conver-
24 sation with him prior to September 28, 1971?

25 MR. BICKS: Besides whom?

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206, which reads:

"Specific reference was made that Mr. Orenstein was monitoring the flow of goods over the counter at key retail outlets."

I ask whether, at this September 1st meeting, you learned of anything of Mr. Orenstein's practice of monitoring retail sales that you had not already known.

A I hadn't learned anything more, that I remember.

Q I call your attention to page 207, the first paragraph.

Did Mr. Mole or anyone else ask at this meeting what recourse a customer would have if they were overstocked with a certain Topper line?

A I don't remember his so doing.

Let me add that we discussed again whether sales were final, and that plus Mr. Rose's comment that the company was hardnosed on returns and discouraged them, I thought took care of the question that you were raising, in our minds, at least.

Q Did Mr. Rose repeat his "hardnosed" statement for Mr. Mole?

A I don't remember.

Consequently, I wanted to leave it flexible, so, if later, in talking to him, something else came out, it would be flexible.

Q Do you know if Mr. Mole communicated at all with Mr. Inglis prior to the private placement?

A Other than the September 1st meeting?

Q Yes.

A I don't know that.

Q I direct your attention to page 4, the last sentence in the paragraph numbered 2: "He"--that would be Mr. Helsdorf--"made no mention of the right to return or exchange merchandise or any special arrangements on such matters between his company and Topper."

Do you see that?

A Yes, I do.

Q You previously testified today, I believe, that you did not ask Mr. Helsdorf or Mr. Folan whether they had exchange or return rights with Topper; is that correct?

A That's correct.

Q At the time you spoke with Mr. Helsdorf and with Mr. Folan, did you expect that, if they had such rights or any similar rights of return or exchange, that they would inform you of that fact during their

1
2 conversation with you?

3 A I don't know whether "expect" is the right
4 word.

5 I certainly, with the benefit of hindsight,
6 would have hoped that they would have told me that, in
7 view of this trade practice, that Mr. Rose told me about
8 on December 22, 1971, of the right of the return if
9 there were overshipments to distributors or--to dis-
10 tributors.

11 Q But you did not have any such belief or
12 understanding at the time you talked to them on the
13 phone?

14 A I didn't know about this practice when I
15 talked to them on the phone.

16 Q So you had no thought one way or the other
17 about it?

18 A No.

19 Q I show you what has been marked as Defendant
20 Hayden Stone's Exhibit Thompson F for identification,
21 which purports to be a memo dated January 4, 1971, and
22 it's changed to "'72" in handwriting, and appears over
23 your name; and I ask whether you prepared the original
24 of this memorandum on or about the date that it bears.

25 A Yes.

what was your basis for making it?

A Well, I believe Mr. Downs in the luncheon portion of the meeting on August 13th made that statement. At this time I'm unsure, but I think it also came up at the September 1st meeting.

In other words, I was told by Topper management.

Q Did Mr. Downs or whoever at Topper management told you indicate how Topper was attempting to place strike that -- indicate which debt Topper was attempting to place on an unsecured basis?

A It would have been the debt that was managed by First National City Bank and its group. My understanding is the Ford money was brought in to provide a year-end clean-up for the banks and our money was then brought in to allow Ford to go unsecured.

That the company planned to do that in late 1971 or early 1972.

Q Can you indicate how going on an unsecured basis would give Topper more flexibility in its daily operation?

A This was ^{a demand} ~~the main~~ line, so the bank could pull the plug any day of the year they felt like it. They were obviously living less under the gun if they had an

What did you mean by that statement? This is the last sentence of that second full paragraph?

A In the past Topper had had problems of coordinating shipments with orders and the trade had given the company very high marks on having eliminated that problem and being able to get the merchandise to the customer very promptly.

Q When you stated that the trade feels that Topper does the best job in this respect, who did you mean by the trade?

A Mr. ~~Hessdorf~~ ^{Hessdorf} and Mr. Polan as representatives of Zayre and J. C. Penney.

Q You had no one else in mind?

A No.

Q Do you recall when after your phone conversation with Mr. Waldman you told Mr. Inglis about that phone conversation?

A It was sometime after the September 1st meeting ^{with} of the Topper people, I would say within a few days of that meeting.

Q Do you think that your conversation with Mr. Inglis in which you told him about your contact with Citibank occurred after the executive committee -- pardon me -- the finance committee meeting on September 2nd?

1 A You are assuming ~~this~~^{there} was a financial com-
2 mitted meeting on September 2nd. I'm not sure that
3 was in fact the case.
4

5 Q Let me restate the question.

6 Do you recollect whether your conversation
7 with Mr. Inglis in which you told him about the bank
8 contact occurred after you prepared the memorandum to the
9 committee on finance dated September 2nd, 1971?

10 A I can't place this precisely, but I would
11 believe it was that day or within a few days afterwards.

12 Q I refer you to that memorandum to the committee
13 on finance, which is Citibank Exhibit No. 2 dated Septem-
14 ber 2nd.

15 A Do you have a copy?

16 (Document handed to witness.)

17 Q And specifically to the first paragraph
18 at the top of page 2 in which you refer to "good invest-
19 ment and inventory controls of Topper."

20 MR. BICKS: Could you point that out,
21 please.

22 MS. BAMFORD: Yes, it's in the fifth
23 line and sixth.

24 BY MS. BAMFORD:

25 Q Do you see that?

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2 Q Do you know whether bank checks were normally
3 made to lending banks?

4 A Yes.

5 Q Can you tell me what procedure the analyst
6 would have followed to determine which bank he should contact
7 normally?

8 MR. BICKS: If you would embark on questions
9 to determine the practice of the Fund with regard to
10 bank checks, would you try to avoid the would have
11 followed.

12 MRS. BAMFORD: I have asked him whether it was
13 usually made and he said --

14 MR. BICKS: You didn't ask him that. You said,
15 "would you make a bank check with a lending bank."

16 Q In a case where you were going to make a bank
17 check, how was it determined which bank should be consulted?

18 A You would select that bank which you believed
19 to be the most knowledgeable on that company's affairs.

20 Q How did you determine which bank that would be
21 who did you ask?

22 A I asked no one in this case.

23 Q Who ordinarily would the analyst have consulted
24 in order to determine which bank would be the most knowledge-
25 able?

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2 Would he have consulted the issuer, officers
3 of the company itself?

4 A Well, he would know from information provided.

5 Q By whom?

6 A By the potential borrower who the persons
7 bankers were.

8 Q Do I understand you to be saying that normally
9 the analyst would obtain that information from the issuer?

10 A Surely.

11 Q Let me ask you a hypothetical question. Had
12 Topper told the Fund that it had a lending relationship with
13 Chase Manhattan of the nature of the loan which First National
14 City Bank had with Topper, that is a secured loan secured by
15 accounts receivable and the other assets of Topper, would it
16 be likely that United States Steel would have contacted
17 Chase?

18 A You said --

19 Q Had Topper told you that it had an accounts
20 receivable loan at Chase, would United States Steel likely
21 had consulted Chase to learn more about Topper's accounts
22 receivable?

23 A Yes.

24 Q Let me refer you to a document which has been
25 previously admitted herein as City Bank Exhibit No. 22,

* * * *

* * *
A All right.

Q I want to return to my question of asking you to describe the general nature of the subject matter discussed at these meetings, and I show you a document to refresh your recollection which I will submit into evidence as City Bank Exhibit No. 27 for identification.

MRS. BAMFORD: Will you mark it City Bank Exhibit 27 for identification.

(The document above referred to was marked as City Bank Exhibit 27 for identification.)

Q Did you prepare that document on or about the date that it bears?

A Yes.

Q Can you tell me what was the nature of the subject matter that arose either at the meeting referred to herein, or typically?

A Typically the economist for First National City reviews his views on the economy. After that the various investment officers share with us the type of things that they are doing in the accounts they manage.

Q Do they refer you specifically to industry areas in which they are contemplating, or not contemplating investment of funds which they hold?

A They tell us in a general way where they think

attractive investments are.

Q What phases of the economy typically were discussed apart from investments at these meetings?

A For example, did you discuss economic trends apart from industry, apart from specific industries, general economic trends of any sort?

A I don't understand what you mean.

Q As I say, the economist would give us his general views.

Q Would these relate to the, for example, the gross national product?

A Yes.

Q Can you recall any other topics?

A Inflation, interest rates.

Q Were these standard topics of conversation at these meetings?

MR. BICKS: By standard, do you mean did they occur more than once?

MRS. BAMFORD: Yes, typically.

A Yes.

Q What benefit did you derive from these meetings?

A It was helpful to have an expert's opinion.

Q As to what?

1 A The First National City Bank economist is a
2 highly regarded economist.
3

4 Q As to what kinds of information did you find
5 the advice helpful?

6 A Well, information or advice is helpful from
7 anyone whom you regard highly for his judgment.

8 Q Did you ever consult City Bank personally for
9 investment advice on behalf of the Pension Fund apart from
10 any discussions in these economic meetings to which we have
11 just referred?

12 A Yes.

13 Q Can you tell me the occasion for any such con-
14 sultation?

15 A At one point we were considering an investment
16 in a company called Digitronics in which City Bank was doing
17 some lease financing and doing financing via a line of
18 credit for lease equipment.

19 Q How did you learn that City Bank had the lease
20 financing arrangement?

21 A I don't know.

22 Q Approximately when did this consultation on
23 Digitronics take place?

24 A Early '60's is the best I can tell you offhand.

25 Q Do you recall with whom you spoke at City Bank

1
2 regarding Digitronics?

3 A No, I don't.

4 Q Do you recall how you made the contact with
5 City Bank; in other words --

6 MR. BICKS: How you came to speak to the per-
7 son you spoke with.

8 A I can't be specific. I would imagine the
9 company officer, the Treasurer, the President, or its invest-
10 ment banker told me of the relationship between the company
11 and City Bank.

12 Q Do you recall what the job title was of the
13 person that you contacted at City Bank after learning that
14 City Bank had the line of credit?

15 A I am not certain, but I think I probably would
16 have gone through either Mr. Jeffers or someone like that
17 who handled our account.

18 Q Why do you say that you probably would have
19 done that?

20 A Because he was our contact.

21 Q Had you been told by the source who told you
22 that City Bank had the line of credit with Digitronics that
23 the bank that had the line of credit was Chase Manhattan,
24 who would you have contacted at Chase Manhattan?

25 MRS. BAMFORD: That is a hypothetical question.

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2 MR. BICKS: He didn't testify he knows anyone
3 at Chase Manhattan.

4 MRS. BAMFORD: I realize that. That is why I
5 would like to know how he would have determined who
6 to contact under the circumstances.

7 Q In other words, had you not had the relation-
8 ship with City Bank under the 1950 agreement, who would you
9 have gotten in contact with at City Bank, or how would you
10 have approached the bank?

11 MR. BICKS: Try it this way, I would like to
12 wind this up quickly, you want to get his general
13 practice in a bank other than City Bank where there
14 was no contractual arrangement; is that correct?

15 MRS. BAMFORD: Yes.

16 MR. BICKS: How would he determine if he was
17 making a check who to speak with; is that your
18 question?

19 MRS. BAMFORD: Yes.

20 A I might have gotten a name from the person
21 that was bringing the deal, who we were negotiating with.

22 Q Thank you.

23 A There were a lot of other instances.

24 Q I had understood that Digitronics was the only
25 occasion that you could recollect?

1
2 A Ho.

3 Q Were there any others?

4 A There were a number of investments in the
5 purchase of oil royalties, production payments.

6 Q Approximately when did any such contacts take
7 place?

8 A I can't be specific, throughout the term of
9 ten years.

10 Q Would they have been prior to the mid '60's,
11 approximately?

12 A Some.

13 MR. BICKS: Do you mean when did the ten year
14 period to which he has referred to begin?

15 MRS. BAMFORD: It wasn't clear to me, yes.

16 A I don't know if it was ten years, maybe it was
17 the whole 17.

18 Q Have you made any such contacts with the bank
19 in the last ten years that you can recall specifically?

20 MR. BICKS: He, himself?

21 MRS. BAMFORD: Yes.

22 A I can't be specific, I believe so.

23 Q You don't recall any specific occasion or
24 issuer?

25 MR. BICKS: I think he testified that he couldn't

1
2 Citibank has previously identified as your signature.

3 Did you write that letter?

4 A Yes.

5 Q I call your attention to the second
6 paragraph of the letter.

7 A Yes?

8 Q Does that paragraph condition Topper's line
9 of credit on substantial compliance with projections
10 previously received by the bank?

11 MR. LILLIE: Well, the paragraph reads,
12 "The overall availability of funds under said
13 agreement shall be predicated on your substantial
14 compliance with the projections submitted to you
15 by your letter of September 19, 1969."

16 MR. BICKS: That's right.

17 Q What did that paragraph mean, Mr. Waldman,
18 to you, when you wrote the letter?

19 A This indicated that we would continue financing
20 Topper for the ensuing year.

21 Q What did that paragraph mean, I asked?

22 A It indicated that Topper was expected to keep its
23 account within the guidelines we previously discussed.

24 Q What guidelines?

25 A Ratios.

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2 Q Paragraph 2 refers to projections, does
3 it not?

4 A Well --

5 Q That's what I am asking you.

6 A This refers to specific projections.

7 Q Yes.

8 A Yes, this is what we expected of Topper.

9 Q And if Topper didn't produce in accordance
10 with those projections, then what?

11 A It was our option to decide what we wanted to do.

12 Q By your option to decide what you wanted to
13 do, what would you mean? What would your options be?

14 A Continue.

15 Q Or?

16 A Tell them to find another source.

17 Q You have just testified concerning a one
18 and a half million dollar reserve on the books of
19 the bank against two and a half million in re-dated
20 receivables, did you not?

21 A Yes.

22 Q Based on your experience as a credit man
23 and your position as of this time as not only in fact
24 but in form head of the finance department of Citibank,
25 what was the basis for the bank's insistence on such a

warehouse, said they wouldn't pay because they never took the goods. The goods were still in the warehouse."

"Q. Terminal warehouse?"

"A. Terminal warehouse is meaningless. It is on the premises of Topper anyway."

A I don't think that is inconsistent with what I am saying here.

Q You viewed the terminal warehouse arrangement as meaningless from the point of view of reflecting a sale?

A And insuring us that the customer would pay us.

Q What did you mean by meaningless?

MR. LILLIE: Wait a second. Would you read back the question from the SEC testimony, please?

MR. BICKS: I will hand you the testimony.

MR. LILLIE: Fine. Okay. What is the question?

MR. BICKS: What is the pending question?

(The question was read.)

MR. LILLIE: If you recall.

A I referred to the fact that the terminal warehouse was a paper warehouse, not an outside physical separate building owned by some warehouse company.

It was comparable to, I guess, a Lawrence type

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Q Do you have any recollection in late spring or early summer of '71 you began keeping track of what Topper's projection versus receipts were?

A I can't pinpoint it.

Q Were you interested in?

A Luck or Siegel would have kept track of it.

Q Mr. Waldman, I show you a document marked for identification as Plaintiffs' Exhibit 689 which has been identified by its author, Mr. Morton J. Siegel, A.V.P., as a memorandum he wrote to Contract File bearing the date June 9, 1971, and I ask if you received that memorandum on or about the date it bears.

A Yes, I signed it.

Q Does that memorandum purport to report on a meeting which occurred on Monday, June 7, 1971, which you attended on behalf of Citibank?

A Yes.

Q Does that memorandum accurately reflect the salient events at that meeting?

A Yes.

Q I call your attention to the one sentence under the sub-heading "Re-dating" which states, "We agree to advance fifty percent against re-dated customers. At this time, however, if items are not paid at the end --

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A Yes.

Q Is that fair?

A Yes.

Q Do you recall Mr. Orenstein expressing any judgment different from that reflected in Paragraph 2 of Page 2 at those meetings?

A No.

Q And does your signature at the bottom of the memorandum indicate your approval of the client's request "that we provide some leeway in our present guideline as a bridge until the debenture fund and the Ford monies are received"?

A Yes.

Q I call your attention, Sir, back on Plaintiffs' Exhibit 542, to the next to last paragraph thereof, and particularly the two sentences, "The over-advances in anticipation of the past due invoices which occur at the end of July together with advances to be made against the accounts receivable, but in no event should they exceed three million expected to peak in the first week of August."

To what did the "they" refer?

A Where is the "they"?

MR. LILLIE: Here (indicating).

WALDMAN SEC

1 Q Had you ever met him before then?

2 A No. I didn't meet him the first time either. It was
3 on the telephone.

4 Q I see.

5 Did you have any subsequent telephone conversations
6 with Thompson?

7 A He was in to see us on, I think, two occasions subse-
8 quent to the phone call. This was after the problem had
9 arisen with Topper.

10 Q in 1972?

11 A Right.

12 Q Did you prepared any memorandums at any time of your
13 conversation with Mr. Thompson? ✓

14 A No.

15 Q Did you ever indicate to anyone that you did?

16 A Not that I recall, no.

17 Q Have you submitted any memorandums or writings to
18 anyone at the bank with respect to your conversation with
19 Thompson?

20 A Yes, I submitted something to the bank in connection
21 with Thompson's claim to the bank, not made directly to us.
22 The bank received the proceeds of their purchase of debentures,
23 and I mentioned this to Henry Clarke, who told me that this
24 was in the prospectus prepared by Carter Berlin. He offered to
25 get me a copy, which he did. I sent a copy with a covering

* * * *

A I can't say. I don't recall

Q Did you mention any other form of ineligibility other than warehousing?

A I don't think so. The ineligible figure was primarily warehouse, registered.

Q What did you say with respect to the loan balance?

A I gave the figure.

Q The exact figure?

Not so

A Rough figure. Whatever it happened to be that day.

Q Did you make any inquiries to anybody else at the bank of information wanted by Thompson?

A No.

Q Now, you indicated that you discussed the basis of the loans.

A Formerly, yes.

Q Did he ask you whether there were any problems with Topper?

A Not that I recall, no.

Q Did you indicate to him that there were no problems?

A I don't think we discussed problems at all.

Q Did he ask you whether you anticipated any difficulties in the near future in the Topper account?

A Did he ask me that, no.

Q Did you indicate?

A No.

* * * *

1 amount of territory.

2 Q Do you have a clear recollection of that conversation?

3 A Not perfectly clear, no. One of the general conver-
4 sations we have, as I say, all the time. With nothing different
5 about it except a rather brusque, arbitrary way of asking
6 questions. But I mean that is more conditioned by his
7 second visit or first visit. It wasn't all that important
8 of a converssition.

9 Q I am surprised that you have any recollection at all.

10 A I know he called me. We went over the routine.

11 Q Well, when you indicated what you talked about, I
12 think you mentioned three or four or five things.

13 A I would normally answer a reference of that kind
14 with that information.

15 Q Is that why you stated on the record that you gave him
16 that information?

17 A Yes.

18 Q Because that's what you give everyone?

19 A That's what I give everyone.

20 Q Do you recall specifically what you told Thompson?

21 A As I say, it is along these lines.

22 MR. MANN: Off the record.

23 (Discussion off the record.)

24 MR. MANN: On the record.

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1 A Yes. Debtenture, yes.

2 Q Would you have permitted Topper to have an over-
3 advance of \$3,000,000 without assurance that you would receive
4 the proceeds of the private placements?

5 A This was the general reason for giving them the over-
6 advance in the first place. They should not have needed it,
7 except they were anticipating.

8 Q I see. Well --

9 A Over-advances are not specifically limited to any one
10 formula. It is business judgments really.

11 Q This is a bridge between --

12 A He made another line, another over-advance back as
13 late as December when there was no question of new funds coming
14 in.

15 I point this out to you because over-advances are --
16 we make rules, and sometimes we give ourselves a little tighter
17 rule. It is a business decision as to whether you feel the
18 company is good and you are going to get paid, you are going
19 to get the over-advance.

20 Q Is it fair to state in this instance you permitted the
21 overdraft and increased the credit line on condition that you
22 receive the proceeds of the two private placements?

23 A That was what was offered to us, yes. This is what
24 was offered to us.

25 Q It is indicated the proceeds were expected to be

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2 Q You've indicated earlier that a bank check is
3 normally or typically made in connection with a proposed
4 investment.

5 A Sure.

6 Q Is this with regard to any particular kind of
7 issuer, or any particular kind of security such as a bond
8 versus a common stock, or is it the kind of thing that is
9 done in all investments?

10 A No, I would say it depends -- I mentioned be-
11 fore if you were going to make an investment in General
12 Motors you wouldn't probably ask the bank what they think of
13 General Motors. Certainly in this kind of a private place-
14 ment, a smaller organization, you would.

15 Q What was your understanding of how it was
16 learned which bank to check with in an investigation of
17 such a private placement?

18 MR. BICKS: She asked you how they knew to
19 call City Bank?

20 A I don't know how they knew to call City Bank.

21 Q I am asking how ordinarily United States Steel
22 would determine which bank to contact?

23 MR. BICKS: You mean the Pension Fund?

24 MRS. BAMFORD: Yes, I do.

25 A I don't know how he determined from one time

1
2 to another which one to cover, no. Except I think we did
3 do alot of checking with the First National City and one
4 other custodial bank with whom we had a joint custodial,
5 counsel and advice contract.

6 Q Do you have any understanding as to how a bank
7 usually was contacted, that is to say, how it was determined
8 who at the bank should be contacted once it was known which
9 bank was involved with an issuer?

10 A No, I don't. I am sure if you call up and he
11 says he is not the right guy, they give you someone who is.

12 Q Is it your understanding that a bank check
13 would probably have been made in the case of this Topper
14 investment regardless of which bank had the accounts receiv-
15 able loan with Topper?

16 A I certainly would. Particularly if they had
17 any debts, as in this case they were known to be the factoring
18 agent for their accounts receivable.

19 Q Do you have ^{any} understanding as to whether
20 a particular department of a bank would be contacted as
21 distinguished from any other department once it was learned
22 that the bank had a secured loan outstanding?

23 MR. BICKS: You are talking generally now?

24 Q Generally?

25 A I suppose that you generally talk, depending

1 on who is doing the contacting, you talk to as high a level
2 in the loan department as you can find. If they refer you
3 to someone else, which they did in a few cases, I understand,
4 Mr. Lang calling up certain fellows and being referred to
5 the appropriate man.
6

7 Q I see.

8 You indicated earlier that you read audit
9 reports, and that you read this memorandum dated September 2
10 in connection with your decision to approve this loan?

11 A Yes.

12 Q Is it correct to say that you read no other
13 documents at all?

14 A Correct.

15 Q Did you take any other action in connection
16 with satisfying yourself on its approval; no phone calls?

17 A I made no personal investigation other than
18 my discussions with Mr. Mole.

19 Q I would like to refer you to a memorandum
20 which has been admitted as City Bank Exhibit No. 22, which
21 is the Random Thoughts Memorandum.

22 A I don't remember ever seeing this one.

23 MR. BICKS: Do you want him to read it first?

24 MRS. BAMFORD: Yes.

25 Q Will you tell whether you recall having read

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Q In connection with arranging for the sale of such junior participation interests, did you, or to your knowledge, did anyone else at Hayden Stone have any conversations with anyone at Citibank?

A We met some people from both Manufacturers Hanover and Citibank before we decided to go ahead with this particular financing.

Q Particularly I am interested in knowing, Mr. Weill, were you aware that Citibank had required purchase of such junior participation interests as a condition to Citibank's continuing to make advances to Topper?

A I may have been.

Q Are you aware that that was the fact?

A On this particular financing?

Q Yes.

A I really have discussed Topper as little as possible, so --

Q No, were you aware at the time of the financing?

A I say, I may have been, you know, it is conceivable that I was aware of that.

Q I show you a document previously marked for identification as Plaintiffs' Exhibit 512 which is a

* * * *

1
2 receive a fee from the Company for its role in this
3 financing?"

4 A Yes.

5 Q What, if any, role did you play in
6 connection with the second private placement?

7 A Do you have a list of the investors?

8 Q I do not, sir. I don't, I am sorry.

9 A I would have to -- I am sure that's available,
10 and if I had a list of the investors, I could tell you
11 whether any --

12 Q Do you happen to remember whether you played
13 any role in selling that?

14 A I already guessed wrong on the list that you had
15 in front of me.

16 Q I am sorry.

17 MR. BICKS: Off the record.

18 (Discussion off the record.)

19 BY MR. BICKS:

20 Q Did you play any role in originating
21 the idea for that second private placement? I think
22 you indicated that you advised the company --

23 A No, I think that it says the company was re-
24 negotiating a note with Philadelphia & Reading. I am sure
25 we had conversations, and most of the conversations that

2 we had with the company as directors from a financial
3 point of view was our input into what we thought was
4 doable in the way of how the company could raise money
5 to accomplish their corporate objectives.

6 Q Was Edger Investments, Ltd., referred
7 to in the prospectus, Page 12, a customer of CPWL-Hayden
8 Stone at the time of this second private placement?

9 A They purchased it and they had to purchase it
10 from us, because we were the only ones -- if purchasing
11 that investment from us is defined as a customer of
12 the firm, then I would say they were a customer of the
13 firm.

14 Whether they dealt with the firm before, I don't
15 know the answer to that. They may have.

16 Q I am calling to mind the imposition of
17 my question, I meant the latter. You don't know
18 whether Edger was a customer of CPWL-Hayden Stone
19 prior to the second private placement?

20 A I don't know, they may have been.

21 Q Was Mr. Peter Bronfman a customer of
22 CPWL-Hayden Stone, Inc. prior to the second private
23 placement?

24 A I don't know the answer to that. We have a lot
25 of customers --

W 111

1

2

Q He certainly wasn't a customer of yours?

3

A

No.

4

Q

Was Edward Bronfman a customer prior to the second private placement?

6

A

I don't know the answer to that.

7

Q

I just want to call your attention to the transaction described in the paragraph beginning at the bottom of the prospectus, Page 18, that is, the June 1969 purchase by Tonner of certain Topper preferred and common stock held by Lines Bros. Limited, and particularly to the statement at the top of Page 19, and I quote, "In order to obtain the necessary funds to complete this transaction and to raise additional working capital, the Company borrowed \$2,079,000 from a group of private investors."

10

11

12

13

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19

20

And I ask whether it is the fact, as the prospectus states immediately following that, "...CPHL-Hayden, Stone Inc. was paid \$100,000 as a fee for arranging the financing"?

21

A

Yes.

22

Q

What, if any, role did you play in connection with the June 1969 private placement, do you remember?

23

24

25

A

I remember that we discussed the purchase of

1
2 the stock from Lines, and probably discussed the
3 company's need for money and probably helped structure
4 the amount of shares that were -- or made some input
5 to the amount of shares that the company should be
6 issuing in this transaction, and possibly sold
7 some of it to some of my customers. Is this another
8 one where you don't have the list?

9 Q It is, sir, but it is the last of the
10 ones.

11 I call your attention to the fourth
12 private placement of Tonper securities, one that is
13 summarized in the paragraph beginning approximately
14 one-fourth of the way down on Page 19 of the prospectus
15 before you, and it is there stated to have taken place
16 in December 1969 and January 1970, and I ask whether,
17 as the prospectus there recites, Tonper, "paid CBWL-Hayden
18 Stone Inc. \$130,000 for arranging this financing."

19 A Yes.

20 Q What, if any, role did you play in
21 connection with this fourth private placement?

22 A A similar role to that which I might have played
23 in the other financings.

24 Q You don't remember whether you endeavored
25 to interest any particular customer of yours in that

1

2

financing?

3

A I may have. There are or there were customers of mine that from time to time had interests in some of the private placements that Tonper sold.

6

Q This may be useful, it may not be.

7

I show you a document previously marked for identification as Plaintiffs' Exhibit 591 which has been

8

9

identified as a copy of a letter written to the

10

National Association of Securities Dealers by Mr.

11

David L. Downs of Tonper, which purports to list

12

all the stockholders of Tonper as of May 1970.

13

I hand this to you and ask first, with

14

regard to those shareholders listed at the bottom of

15

Page 1 and the top of Page 2, to your knowledge, was each

16

such person a present or former employee of Cowan, Berlind

17

Weill & Levitt, Inc. as of May 23, 1970? That's what

18

it says.

19

A The answer is yes.

20

Q You might just check. Mr. Berlind thought

21

so, but why don't you check and make sure.

22

A Yes, at one point or another each of these

23

individuals worked for our firm.

24

Q May I ask that you look over the list

25

of additional shareholders which begins in the second

1
2 paragraph, Page 2, and goes on.

3 A Starting with --

4 Q Only for the purpose of seeing whether
5 you can identify any of the shareholders as customers
6 of yours.

7 A Headen & Company.

8 Q Do you remember the particular financing
9 which Headen participated in?

10 A No.

11 Q Go ahead.

12 A Arthur Cohen, Herb Rosenthal, Bobby Sarnoff,
13 David Werblin, that's it.

14 Q As you went through that list, do you
15 happen to remember which of the private placements
16 any one of those customers participated in?

17 A No.

18 Q Did you participate in the decision by
19 the CBWL-Hayden Stone profit sharing and saving plan
20 trust to purchase the 200,000 in notes and thereby
21 to receive 4,000 shares of Copper common stock via
22 this private placement?

23 A I believe I did.

24 Q You were trustee at that time?

25 A Right.



* * * We'll * *

had some comments on, which I would assume, if I did,

they would have been changed or not.

4 This was not a -- this is a document prepared
5 by a corporate finance department of the company
6 of which I had knowledge of. And therefore, based
7 on my knowledge and understanding, I would have been
8 able to make comments on. I felt this was a fair
9 document.

10 Q I call your attention to Footnote 3 on
11 Exhibit 1, Page 34, that's the prospectus.

12 A Page what?

13 **O** Footnote 3, Page 34, financials.

14 A Circled.

15 Q I just want to ask you some questions
16 about what is reported in that footnote.

17 Is the 14 million in sales made in December
18 1970 on extended credit term, which, for the sake of
19 shorthand reference, with your permission, I would like
20 to refer to it as the 1971 spring program, without
21 repeating 14 million of sales made in December on
22 extended credit terms.

23 What is the first time you can recall
24 hearing of the 1971 spring program?

25 A I believe it was in the summer of 1970.

1

2

Q Was that at a board meeting?

3

A I believe so.

4

Q What were you told about it then?

5

A It was a program that appeared to make sense for the company, in dealing with their customers who they would be able to participate in the option to buy that was available to the customers; and what they had to do to compete with what other companies in the industry were doing, namely, Mattel and Ideal, and that it was helping the company sell lower-priced merchandise that would expand their selling season from more than just a seasonal one-time-of-the-year business to a year-round business. It appeared to make sense.

16

Q Was the approximate size of the program reported to the board?

17

18

A I believe so.

19

Q Do you remember what it was anticipated to amount to in the summer of 1970?

20

21

A My best recollection at the present time is that it was a 14 million dollar program, whether it was a four million dollar program or 40 million dollar program, the only number -- I have heard 14 million so much that I don't think I have heard anything

22

23

24

25



32k

1

Weill

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* * * * *

Q Yes, do you have any recollection of Mr.

3

Sterrett coming to you with some questions?

4

A Yes, I do.

5

Q Tell us what you recollect.

6

A Thank you.

7

We had a luncheon with a group of people in our office.

8

Q This is when, approximately April, 1970?

9

A Yes. Maybe -- yes, I guess, in April, 1970.

10

The express purpose was to discuss Topper and several

11

Topper officers were there and several people from our

12

firm were there.

13

And I believe that Mr. Orenstein thought we were

14

going to be talking about Humpty Dumpty and something

15

else and Conrad went on a series of questions that

16

Mr. Orenstein thought he knew that Conrad had asked of

17

other employees of the firm and had already gotten the

18

answers. And he got miffed that the same questions that

19

had already been asked of other people were now being

20

asked of him and he thought, "What kind of silly practice

21

is this? This is a big waste of time. I am a creative

22

genius and I have to do my own thing and the person is

23

asking the same question that the other person asked."

24

My sole purpose in this thing was really as a mediator.

25

It appeared this meeting was going no further and Henry was

1

2

upset and we decided that was the end of that meeting.

3

I spoke to Conrad and I said, "Let me know what you want

4

to know. Make up a list of what ever your questions

5

are, and I will make sure those questions get answered."

6

I called Henry Orenstein and I told him that

7

"If you ever want us to do a financing for your company

8

and you want to go public," and he had never done that

9

before, -this was the company's first public offering -

10

"we have to do our due diligence and this is the

11

officer in charge of our investigation and you have to

12

answer his questions."

13

And machinery was set in process where Conrad was

14

able to get satisfaction on all of those questions.

15

I did not act as an intermediary except in getting

16

the people the knowledgability that they had to respond

17

to the questions.

18

Q You yourself did not then put any of the

19

questions to Mr. Orenstein or any of the other people

20

at Topper?

21

A I might have sent Henry Orenstein a letter; I

22

don't remember how it happened. I might have sent a

23

letter saying that these were the things that he had

24

to answer.

25

I don't remember that. I do remember that I told

34k

1

2 him that silly as anything may seem, he had to answer
3 all the darned questions. If he wants to move ahead
4 with our firm, that's the way we do it and let's get on
5 with the show.

6 Q Referring, then, to the memo from Mr. Sterrett
7 and the questions attached which are plaintiff's exhibit
8 564 for identification, do you have any recollection now
9 of reading and reviewing this document at the time?

10 A Yes, I do.

11 Is this from Conrad's?

12 For example, the part of the stuff on the first
13 page, that goes back to 1966.

14 I remember Conrad asking us specific questions and
15 Henry saying, "Why are you asking me that? Stanley Rogers
16 knows those answers." That's when I got back to them.
17 Conrad has to know those answers.

18 Exactly. Conrad was testing all of the assumptions,
19 asking argumentative type questions. Yes, I remember
20 that.

21 Q You remember reading it yourself? Let me
22 ask you one question at a time.

23 Do you remember reading this yourself at this time?

24 A I remember reading something that appeared to be
25 like that at that time.

1

2 Q Do you --

3 A Do I remember all of the specific questions, no.

4 But go ahead.

5 Q Do you recall being yourself aroused by any
6 item in there, motivated to make any independent inquiry
7 of your own?8 A I think one of the problems that developed and
9 why this whole situation occurred is that we had asked
10 a lot of those questions that Conrad was asking, going
11 back to before Conrad was with the firm.12 And we thought we knew the answers to those
13 questions. Conrad had asked them of other people. He
14 wanted Henry to answer those questions.15 And if you know Conrad, this is the way he phrases
16 questions. It doesn't mean that that is what he thinks.
17 This is how he gets to the point of making sure that
18 is not the policy.19 Q I'm sorry, sir, maybe I didn't make myself
20 clear.21 The question that I am asking you, is there anything
22 in this that aroused your own independent curiosity so
23 that you asked either Mr. Orenstein or someone else in
24 the company, "hey, how about this?"

25 A We can do it better if you really refer to number 11

36k

1

Jell

2 or the whole thing.

3 Q I will get to number 11. You can start wherever
4 you want.

5 A You want me to go through every one?

6 Q Unless you don't understand it, my question
7 is whether you yourself were motivated to make any
8 independent inquiries of your own?

9 A Of the company?

10 Q Yes.

11 A Most of these items I have made those independent
12 inquiries at many different occasions and was perfectly
13 satisfied that the subject matter of these questions were
14 not things that would be answered in the negative.

15 Q In other words, with regard to most of
16 the times you did not feel there was any need for you
17 to make any inquiry of your own?

18 A What I have said, that is not true. I have made
19 inquiries about these things on my own many times. Before
20 we ever got associated with the company we discussed this
21 whole thing of what happened with Philadelphia and
22 Reading, before I ever heard of Conrad Sterrett, and
23 Orenstein got upset --

24 Q After you received that document.

25 A Did I ask the questions again?

1 Q Any questions.

2 A About Philadelphia and Reading? No. We asked the
3 question about sales, all the time, many times.

4 Q After you received this memo did you call any-
5 body at Topper and ask them about the subject matter of
6 question number 11?

7 A Question number 11 is a question that I must have
8 asked of every guy at Topper that I knew, at one point
9 in time or another.

10 Q I am trying to confine it to a period after --

11 A I might have asked him that question a day before.
12 I wouldn't have to ask it again. I wanted to make sure
13 that Conrad could hear through his own ears the answer
14 to question 11 from as many people in that company as he
15 felt he had to hear it from. And I know the answer
16 that he got.

17 Q What was the answer that he got?

18 A That the company sales are finals, and that nobody
19 has a legal right to exchange any merchandise whatsoever.

20 Q Had you yourself asked that question previously?

21 A Many times.

22 Q And what answer had you gotten?

23 A Exactly the same answer.

24 Q To whom had you addressed the question in the
25

1
2 company, you personally?

3 A Henry Orenstein, Rose, many people. Ronnie Saypol,
4 David Downs, who was with the bank.

5 Q Did you ever ask Mr. Sterrett why he was
6 raising these questions again?

7 A Because Conrad Sterrett has a policy, I believe it's
8 his philosophy to double check what the people say.
9 And he may have gotten satisfactory answers to those
10 questions from one group of people and then he will ask
11 somebody else at the company to see whether they
12 contradict one another or not. That's how he does his
13 investigations and he wanted some of the answers from
14 Henry.

15 Q My question is, did you ever say to him, "You
16 asked it once. Why do you want to ask it again?"

17 A No, because he explained to me. I knew what he was
18 doing.

19 Q Did Mr. Sterrett indicate to you that he felt
20 that this practice was going on inside the company?

21 A Absolutely not.

22 Q Did he indicate to you that he had a suspicion
23 that it might be going on in the company?

24 A Quite the contrary. You should ask -- Conrad himself
25 was very well satisfied in his mind that this practice

1

Well

2

was not going on at the company based on the investiga-

3

tion that he did.

4

Q Did you have any knowledge at the time to

5

question this statement: "We also understand that the

6

competitive situation in the industry is such that

7

all major manufacturers must in effect guarantee sales

8

to major customers if the company wishes to maintain a

9

continuing relationship?"

10

A That's a loaded question.

11

Q Is is loaded, right, I will agree with you.

12

A The same way you are asking me that loaded question,

13

I think that's what Conrad was asking or wanted answered

14

from Henry to get the answer.

15

Q My question is -- let's not talk about Topper.

16

Let's talk about the competitive situation in the

17

industry.

18

A I don't think that -- I think you assume that the

19

statements that you are reading there were the factual

20

events at the time rather than hypothetical statements

21

designed to elicit a response.

22

Q Sir, I don't want to quarrel with you, but

23

the first three words are not "Is it true that." The

24

first three words are "We also understand that,"

25

which appears to be a factual statement.

1
2 A This is a copy of a memorandum prepared by myself
3 in January 1971.

4 Q You wrote this memorandum, it appears from page
5 1, for the direct attention of Mr. Cook?

6 A Yes.

7 Q His name is Errol Cook, is that right?

8 A Errol, yes.

9 Q When were you first aware that Topper stored mer-
10 chandise in the New York Terminal Warehouse in December
11 1969 for its customers?

12 A The physical inventory relating to the December 31,
13 1969 audit was taken roughly a week or so prior to December
14 31, 1969 and I recall that in my work regarding inventory
15 that one of the reconciling items between the physical
16 inventory and the year end inventory was a reduction of
17 Topper inventory related to a sale that was, subsequent to
18 the physical inventory, to be delivered to New York
19 facilities.

20 Q I call your attention to the 6th page of your
21 memorandum, which is marked as Plaintiffs' Exhibit 966, and
22 particularly to the language beginning with the third line:

23 "I am sure that we can determine exactly how
24 much of the 12/31/69 one, B and II, and two, New York
25 Terminal merchandise was delivered to customers during

1970."

Did you undertake, subsequent to writing this memorandum, efforts to find out how much of the merchandise described there was actually shipped to customers during 1970?

A I believe that the week subsequent to the preparation of this memoranda, when Errol Cook was at the Elizabeth Port plant, that this information was obtained.

(Document marked Plaintiffs' Exhibit 967 for identification, as of this date.)

(Document marked Plaintiffs' Exhibit 968 for identification, as of this date.)

Q Mr. Zoll, I hand you two documents marked as Plaintiffs' Exhibits 967 and 968. 967 is a handwritten schedule entitled "12/31/69 Kresge items not shipped" and Plaintiffs' Exhibit 968 is a copy of a Topper invoice to SS Kresge which appears to be dated 12/31/69.

However, Plaintiffs' Exhibit 968 is less than legible.

Was Kresge one of the Topper customers who had merchandise stored for it in the Terminal Warehouse in December 1969?

A Yes.

Q Does Plaintiffs' Exhibit 967 show the amount of

1
2 that merchandise which was not shipped to Kresge during
3 1970?

4 A I believe that is true.

5 Q And the dollar value of that merchandise would be
6 listed under the column entitled "Sales Not Shipped"?

7 A I believe that is correct.

8 Q On Plaintiffs' Exhibit 968, can you make out what
9 the net amount of merchandise sold to Kresge as reflected
10 in this invoice was?

11 A Well, it is approximately \$400,000.

12 Q Yes, that's what it appears to be.

13 So parsing 967 and 968, is it fair to say then
14 that roughly 224,000 of the approximately \$400,000 in
15 sales were not shipped during 1970?

16 A I believe that is correct.

17 Q Do you know whether these sales were sold on
18 extended dating or credit terms?

19 A I don't recall now, but I don't believe that
20 they were. As I recall, Kresge paid this invoice in early
21 1970.

22 Q Do you recall inquiring on that subject?

23 A Which subject?

24 Q Whether or not Kresge paid for this invoice at the
25 time the merchandise was shipped to the warehouse, or

whether the payment terms were on extended dating.

MR. FISKE: Does he recall?

MR. DAILEY: Does he recall inquiring about that.

MR. FISKE: At what time are you asking?

MR. DAILEY: In connection with his review in 1970 of the merchandise which was not shipped during that year.

Q During the 1970 audit, did you make inquiries as to the terms under which the merchandise in the warehouse was stored?

A Well, I don't recall making inquiry as to the terms in regards to the 1970 audit. I do believe that the December 31, 1969 work papers include evidence that the invoice was paid in January or February of 1970.

Q Do you recall what adjustments Topper made to Kresge or with Kresge for the merchandise which was not shipped?

A I don't recall.

(Documents marked Plaintiffs' Exhibits 969 and 970 for identification, as of this date.)

Q Mr. Zoll, I hand you two documents marked for identification as Plaintiffs' Exhibit 969 and Plaintiffs' Exhibit 970. Plaintiffs' Exhibit 969 is a handwritten

Commerce Reporting Company Inc.

1
2 schedule entitled "1969 Bill and Hold."

3 Plaintiffs' Exhibit 970 is a copy of a Topper
4 Corporation invoice to EJ Korvette dated 12/1/1969.

5 Did Topper store merchandise in the New York
6 Terminal Warehouse for EJ Korvette in December 1969?

7 A I believe that merchandise was stored for EJ
8 Korvette on a bill and hold basis and not stored in the
9 New York Terminal facility.

10 Q What do you mean by a bill and hold basis?

11 A This would be where Topper has segregated toys
12 sold to a customer on its own premises as opposed to ship-
13 ment to New York Terminal.

14 Q Would this transaction which you have described,
15 or was this transaction which you have described treated
16 as a sale by Topper?

17 A I believe that it was.

18 Q Even though the merchandise was not shipped to
19 the customer?

20 A Yes. That is correct.

21 Q And even though the merchandise was not shipped
22 to the New York Terminal Warehouse?

23 A Yes. I believe that is correct.

24 Q The New York Terminal Warehouse was an independent
25 warehouse?

1
2 A Yes.

3 Q By that I mean a company other than Topper con-
4 trolled it, or shall I say, owned it, or had responsibility
5 for the merchandise in there?

6 A Yes.

7 Q Do you know what the policy of Topper was in
8 terms of recording a transaction as a sale? What events
9 would give rise to Topper recording a transaction as a
10 sale?

11 MR. FISKE: Are you talking about these--

12 MR. DAILEY: I am speaking generally.

13 Q When did Topper record sales? Upon the receipt
14 of a purchase order, upon the ^{shipment} ~~shipment~~ of goods? Was there
15 a policy? Would it depend on each customer, each circum-
16 stance?

17 MR. FISKE: Are you talking about 1969 and
18 1970?

19 MR. DAILEY: I am referring particularly
20 to 1969 and to 1970, but if the policy changed during
21 any period I wish you would incorporate that in your
22 response.

23 A The recording of sales and the related receivables
24 take place when liabilities receivable from customers arise.

25 Q When did Topper consider the liability of a

1
2 customer to arise for a receivable? Did it arise upon
3 the receipt of a purchase order from a customer?

4 A No. Liabilities from customers would arise when
5 sales were made.

6 Q I am trying to leave aside the legal conclusion
7 of a sale and to focus on what events would have to take
8 place before Topper would include a transaction on its
9 books as a sale.

10 MR. FISKE: I think we might make more
11 headway more quickly if you could put some specific
12 questions to him.

13 I think the problem is you are asking him
14 to think back to Topper's entire method of doing
15 business five years ago and I think if you have got
16 some particular things in mind, and I suspect you do,
17 why don't you ask him about those individually.

18 MR. DAILEY: That's what I was trying to
19 get at. There are really not that many events.

20 Q I assume a customer orders goods?

21 A Yes.

22 Q And you say that would not give rise to a sale,
23 the receipt of a purchase order?

24 A No.

25 Q Would the manufacture of the goods for the

customer give rise to a sale?

A No.

Q Would the shipment of goods to a customer give rise to a sale?

A Well, a sale would take place whenever two parties, a seller and a buyer, agree that a sale took place.

Q In connection with Plaintiffs' Exhibit 969, I believe you testified this was a bill and hold arrangement and that it was recorded as a sale?

A That is my belief.

Q So in this instance the customer was not shipped goods, nor were the goods sent to a warehouse, but a sale was recorded?

A Yes.

(Document marked Plaintiffs' Exhibit 971 for identification, as of this date.)

(Document marked Plaintiffs' Exhibit 972 for identification, as of this date.)

(Document marked Plaintiffs' Exhibit 973 for identification, as of this date.)

(Document marked Plaintiffs' Exhibit 974 for identification, as of this date.)

Q Mr. Zoll, did Topper transfer merchandise to the New York Terminal Warehouse in December 1970 under what we



1 rebates, they seem to correspond to work paper binders, so
2 it would be reasonable to speculate that that may have been
3 the source of this comment, but I don't know.
4

5 MR. DAILEY: Let's take a short recess.

6 (Whereupon, a recess was taken.)

7 (Group of documents marked Plain-
8 tiffs' Exhibits 981 through 992
9 for identification, as of this
date.)

10 Q Mr. Zoll, I show you Plaintiffs' Exhibits 981
11 through 992, which are copies of various letters to New
12 York Terminal Warehouse and certain customers of Topper.
13 All of these appear roughly to be the same.

14 Putting aside the exhibits just for a moment,
15 were you aware generally of the terms which existed in
16 connection with the merchandise in the Terminal Warehouse
17 between Topper, its customers, and the Terminal Warehouse?

18 A Yes.

19 Q Calling your attention to, for example, Plaintiffs
20 Exhibit 981, the letter or a copy of the letter states:

21 "This letter will constitute your authority to
22 deliver from your warehouse No. 1 to Topper Corporation
23 upon its request property stored there in and covered
24 by your non-negotiable warehouse receipts now or here
25 after issued to the undersigned."

There are certain provisos which follow that.

At the time of the 1970 audit, were you aware of the right of Topper pursuant to letters such as this to take merchandise from the warehouse which had been originally stored there for a customer's account?

A Yes, I believe I was.

Q Do you recall any conversation with a Mr. Voigt of Topper in early 1971 in connection with the 1970 audit relating to the substitution of merchandise in the New York Terminal Warehouse to a Topper customer?

A No.

Q Let me refer back to Plaintiffs' Exhibit 966, which is your memorandum to Mr. Cook. I call your attention to page 4 of the memorandum. Would you just read the paragraph to yourself beginning at the bottom of page 4 and continuing over to page 5?

A Yes.

Q Who is the gentleman whom you have described in this memorandum as John, do you recall?

A John would be John Voigt who was in charge of the customer service area.

Q Do you recall the conversation which you are recounting in this memorandum?

A I don't recall the conversation, but I am aware



1
2 EXAMINATION BY MR. GREINER:

3 MR. GREINER: Mr. Zoll, you are reminded
4 you are still under oath.

5 Q Mr. Zoll, at the time that you worked on the 1970
6 audit of Topper did you have an understanding as to whether
7 Topper granted rights of return to customers at the time
8 that it sold goods to such customers?

9 A I did not have such understanding.

10 Q Did you have an understanding that Topper did not
11 grant rights of return to such customers?

12 A That is correct.

13 Q Did you have an understanding whether Topper
14 granted rights ^{of} exchange to customers at the time that it
15 made sales to customers?

16 A I did not have such understanding.

17 Q Do you mean to say that you had an understanding
18 that no rights of exchange were granted?

19 A Yes.

20 MR. WEISKOPF: In other words, yes, you
21 had an understanding and your understanding was
22 no?

23 THE WITNESS: That is correct.

24 Q Can you tell us on what your understanding was
25 based that Topper did not grant rights of return or rights

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X
UNITED STATES STEEL AND CARNEGIE :
PENSION FUND, INC., CONNECTICUT MUTUAL :
LIFE INSURANCE COMPANY, et al., :

Plaintiffs-Appellants, : AFFIDAVIT OF SERVICE
ON PERSON IN CHARGE

-against- :

HENRY ORENSTEIN, FIRST NATIONAL CITY :
BANK, HAYDEN STONE INC., et al., :
Defendants, :

-and-

FIRST NATIONAL CITY BANK, :

Defendant-Appellee :

-----X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MORRIS ARNSTEIN being duly sworn, says: I am
employed in the office of Breed, Abbott & Morgan, 1 Chase
Manhattan Plaza, New York, N.Y. 10005, attorneys for the
Plaintiffs-Appellants in the above action.

On the 28th day of January, 1977, I served
the annexed JOINT APPENDIX ON APPEAL - VOLS. I - V

on the attorney(s) listed below by delivering the same to
and leaving the same with the person in charge of said office(s).
Shearman & Sterling, Esqs., Attorneys for Defendant-Appellee
53 Wall Street, New York, New York 10005

Sworn to before me this
28th day of January, 1977

Edna J. Watrous

Morris Arnstein
Morris Arnstein